Supreme Court, U.S.
FILED

05-306 SEP 6 - 2005

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

GERARD V. SUNNEN,

Petitioner,

– against –

THE NEW YORK STATE DEPARTMENT OF HEALTH, BOARD OF PROFESSIONAL MEDICAL CONDUCT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the choice of the administrative law judge, at the Petitioner's disciplinary hearing, not to recuse herself, nor to disclose, on the record her residence of several years, in the same apartment building where one of the two complaining witnesses resided and afford the Petitioner a motion for recusal, based on the foregoing, deprive the Petitioner of a fair and impartial hearing?

2. Is an administrative law judge, who does not decide the issue on trial, and whose function is limited to procedural and evidentiary rulings, governed by the same criteria as a trier of the facts, if the statute concerning judicial review of the administrative hearing's decision, considers only whether the evidence in the record at the hearing, supports the decision?

PARTIES TO PROCEEDING

The parties to this proceeding are, as they appear on the cover.

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Barszez v. Board of Trustees of Community College Dis No. 504, Cook County 400 F. Supp. 675, Affd 539 F 2d 715 Cert. dismd 420 US 1080, 97 S. Ct. 827, 50 LEd 2d 801 (1975) 7

Feldman v. Gardner, 460 US 462, 103 S.Ct. 1303, 75 L.Ed 2d 206 (1983) 1

Rooker v. Fidelity Trust Co., 263 US 413, 44 S.Ct. 149, 68 L.Ed 362 (1923) 1

Other Authority

3 Davis, Administrative Law §19.2-19.4 [2d ed, 1978] 7

Citations of the Official and Unofficial Reports of the Opinions and Orders

The Order of the Supreme Court for the County of New York, dated December 15, 2003, is reproduced in the Appendix at page A-5.

The Order of the Appellate Division — First Department, dated February 17, 2005, is reproduced in the Appendix at page A-3.

The Order of the Court of Appeals, dated June 7, 2005, denying petitioner's motion for leave to appeal is reproduced in the Appendix at page A-1.

Basis of Jurisdiction

Review of final decision, order and judgment of highest court in New York, entered June 7, 2005 denying leave to appeal. There was no rehearing. The New York Court of Appeals denied leave to appeal the decision, order and judgment of the New York State Supreme Court, Appellate Division, First Department, entered February 17, 2005.

The United States Supreme Court has jurisdiction pursuant to *Feldman v. Gardner*, 460 US 462, 103 S.Ct. 1303, 75 L.Ed 2d 206 (1983) and *Rooker v. Fidelity Trust Co.*, 263 US 413, 44 S.Ct. 149, 68 L.Ed 362 (1923).

Constitutional and Statutory Provisions Involved

United States Constitution, 14th Amendment

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

Factual and Procedural Background

The Petitioner was the subject of a disciplinary hearing by the Respondent. The charges were based on the complaints of two persons who identified themselves as psychiatric patients of the Petitioner. The Respondent decided against

the Petitioner and revoked his license to practice medicine. The Petitioner exhausted his right to judicial review and was denied any remedy.

Approximately five years thereafter, the Petitioner fortuitously learned that one of the two complaining witnesses lived in the same apartment building as did the administrative law judge at the disciplinary hearing, prior to, during the events this witnesses testified to, some of which she alleged occurred in her apartment, and continuing throughout the lengthy hearing. The administrative law judge had not disclosed the foregoing facts. In so far as the Petitioner knew and the record disclosed, the administrative law judge and the complaining witness were strangers.

The administrative law judge did not recuse herself, nor place the issue of her residence on the record, nor afford the Petitioner a recusal motion on the foregoing grounds.

The Petitioner sued in the New York Supreme Court, pursuant to 42 USC §1983. The gravamen of the complaint was independent of the issue considered at the hearing. The Complaint was, that the foregoing misconduct of the administrative law judge denied due process to the Petitioner. The motion term of the New York Supreme Court dismissed the Complaint on the grounds that, pursuant to the applicable statute, Civil Practice Law and Rules, Article 78, the exclusive remedy of the Petitioner was a proceeding pursuant to that statute, the exclusive forum was the New York State Appellate Division, Third Department and the time within which to commence such a review had expired years ago.

The Petitioner appealed dismissal of his complaint, to the New York State Appellate Division, First Department, arguing that the Complaint was not concerned with the charges against him, which were considered at the Respondent's administrative hearing. The Petitioner's Complaint concerned the denial of due process to him, at that administrative

hearing, on the grounds of the administrative law judge's suppression of her residence in the same building with one of the Complainants and possible association between them which would have included exparte communication.

The New York State Appellate Division affirmed the motion court's dismissal of the Complaint, without mention of the due process issue, which was the crux of the action. The New York State Court of Appeals denied the Petitioner's motion for leave to appeal the order and judgment of the Appellate Division.

Constitutional Questions Presented in Courts Below

In the New York State Supreme Court, the Complaint plead violations of 42 USC 1983, on the grounds of denial of due process. The administrative law judge did not recuse herself, nor afford a hearing on recusal. The failure of the administrative law judge to state on the record that she lived in the same apartment building as did the Complainant, prior, during the time of the events at issue alleged to have occurred in the complainant's apartment and continuing through the lengthy hearing, deprived the Petitioner of the opportunity to move for recusal on grounds of partiality.

The Petitioner's appeal to the Appellate Division sought review of dismissal of the Complaint setting forth the foregoing. The Court of Appeals denied leave to appeal without stating a reason. The New York State Supreme Court did not consider the denial of due process argument, nor did the Appellate Division, nor the Court of Appeals.

Argument in Support of Petition

The Petitioner's 42 USC §1983 complaint, was that he was denied due process, because the administrative law judge suppressed the fact that she lived in the same apartment building as did one of the two complaining witnesses prior, during the events to which the witness testified occurred

in the building, and throughout the administrative hearing. The Petitioner's argument was that due process required the foregoing should have been disclosed, and the administrative law judge should have recused herself, or afford the Petitioner a hearing on recusal on the basis of the foregoing.

The Complaint was explicit that it did not seek judicial review of the Respondent's decision in the administrative hearing against the Petitioner. That was concluded. The Petitioner made the same argument to the New York State Supreme Court Appellate Division, that the Complaint subjudice concerned denial of due process because the administrative law judge, did not recuse herself nor afford a recusal hearing. The motion and appellate courts in New York were mistaken in dismissing the Complaint on the grounds that the Petitioner sought to relitigate his disciplinary hearing. The Complaint was concerned with the conduct of that administrative hearing, not with the issue considered at the administrative hearing. The due process issue based on the administrative law judge's suppression of her residence was not raised at the disciplinary hearing, because it was undisclosed.

The fact that the administrative law judge did not decide the ultimate issue at the hearing is not determinative, because, pursuant to Civil Practice Law and Rules, Article 78, the judicial review afforded to the Petitioner, of the disciplinary decision of the Respondent, was limited to whether the ultimate decision was supported by the evidence in the record. The administrative law judge controlled the latter.

The Petitioner can refer to several instances in the record of the administrative hearing in which the administrative law judge made ruling which the Petitioner was, and remains, convinced were affected by the bias of the administrative law judge in favor of the complaining witnesses, who resided in the same building for many years. However, in the absence

of hearing, on whether the complaining witness and the administrative law judge had any degree of interrelation with each other in the course of years, and if so, the extent of such relationship, on the basis of common residence, in the same apartment building, the Petitioner was without recourse.

It is axiomatic that due process requires not only an impartial judicial trial, but also, an impartial administrative trial. *Barszez v. Board of Trustees of Community College Dist No. 504, Cook County*, 400 F. Supp. 675, aff'd 539 F.2d 715, certiorari dismissed 420 U.S. 1080, 97 S. Ct. 827, 50L Ed 2d 801(1975). The Petitioner had a due process right to have the administrative law judge disclose that there could have been an acquaintance with the complaining witness, acquired from years of residence in the same building and furthermore lay bear any opinions the administrative law judge may have formed concerning the complaining witness on the basis of the foregoing. Of greater concern than prejudgment of issues of law or policy, is, ". . . a preconceived view of facts at issue in a specific case. . . *3 Davis, Administrative Law* §19.2, 19.4 [2d id, 1978]

Conclusion

The application of certiorari should be granted.

Dated: New York, New York
September 6, 2005

Respectfully,

MARVIN M. DAVID
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APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of June 2005

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 319

Gerard V. Sunnen,

Appellant,

v.

The New York State Department of Health, Board of Professional Medical Conduct,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon laid, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Tom, J.P., Andrias, Ellerin, Gonzalez, Catterson, JJ.

5408 Gerard V. Sunnen,

Plaintiff-Appellant,

-against-

The New York State Department of Health, Board of Professional Medical Conduct,

Defendant-Respondent.

Bryer & David, New York (Marvin M. David of counsel), for appellant.

Eliot Spitzer, Attorney General, New York (Marion R. Buchbinder of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 2, 2004, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff's license to practice psychiatry was revoked in 1996 for engaging in sexual relations with two of his patients, improperly prescribing medication for them, and consuming alcohol with one of them. Plaintiff brought an article 78 proceeding in the Appellate Division, Third Department, which has exclusive jurisdiction to review determinations of the Administrative Review Board for Professional Medical Conduct (Public Health Law § 230-c[5]; *Horne v New York State Dept. of Health*, 287 AD2d 940 [2001]). That court confirmed the administrative determination, rejecting plaintiff's challenge based on an unsubstantiated allegation of personal bias on the part of one member of the Board's Hearing Committee (*Matter of Sunnen v Administrative Review Bd. for Professional*

Med. Conduct, 244 AD2d 790 [1997], *lv denied* 92 NY2d 802 [1998]).

Five years later, plaintiff now seeks vacatur of the revocation and a de novo hearing on the ground that the administrative law judge who presided over his disciplinary hearing should have recused himself because he lived in the same apartment building as one of the complaining witnesses. In these circumstances, this action was properly dismissed for lack of subject matter jurisdiction.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUAKY 17, 2005

/s/ Catherine O'Hagan Wolfe
CLERK

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich, Shirley Werner, J. PART 54
Justice

0109127/2003

SUNNEN, GERARD V.
vs.
N.Y.S. DEPT. OF HEALTH

SEQ 1

DISMISS ACTION

INDEX NO. 109127/03

MOTION DATE _____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

NYS SUPREME COURT
RECEIVED
DEC 19 2003
I.A.S. MOTION
SUPPORT OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause - Affidavits — Exhibits _____	1, 2
Answering Affidavits — Exhibits _____	3
Replying Affidavits _____	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to dismiss is granted. In its amended complaint, plaintiff seeks a vacatur of defendant's Administrative Review Board Determination and Order and a hearing de novo. Public Health Law § 230-c(5) provides that "an order of the administrative

review board for professional medical conduct . . . may be reviewed pursuant to the proceedings under article seventy-eight of the civil practice law and rules. Such proceeding shall be returnable before the appellate division of the third judicial department[.]"

Under PHL § 230-c(5), this Court does not have subject matter jurisdiction over the instant action. Accordingly, plaintiff's complaint is dismissed.

The foregoing constitutes the decision and order of this Court.

FILED
JAN -2 2004
COUNTY CLERK'S OFFICE
NEW YORK

SHIRLEY WERNER KORNREICH
J.S.C.

Dated: 12/15/03

/s/ Shirley Werner Kornreich
J.S.C.

Check One: ☒ FINAL DISPOSITION
☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____